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NO.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

BUNGE EDIBLE OIL CORPORATION

Petitioner

VERSUS

CANADIAN PACIFIC (BERMUDA) LTD.
AND A.S. DAMPSKIBSSELSKABET TORM

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether an unreasonable deviation by a "COGSA carrier" breaches the Carriage of Goods by Sea Act and the contract of carriage to which the Act applies and thereby eliminates all of the carrier's defenses including the one year time for suit defense.

LIST OF PARTIES

The petitioner, Bunge Edible Oil Corporation, is the owner of a cargo of palm oil shipped aboard the M/V's TORM RASK and FORT STEELE.

The respondent, A. S. Dampskibsselskabet Torm, is the owner of the M/V TORM RASK.

The respondent, Canadian Pacific (Bermuda), Ltd. is the charterer of the M/V TORM RASK and owner of M/V FORT STEELE.

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PETITION FOR WRIT OF CERTIORARI
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The petitioner, Bunge Edible Oil Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above entitled proceeding on January 2, 1992, rehearing denied January 30, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 949 F.2d 786 (5th Cir. 1992). The opinion of the United States District Court for the Eastern District of Louisiana is reported at 256 F.Supp. 261 (E.D. La. 1991).

JURISDICTION

The judgment of the Court of Appeals was entered on January 2, 1992. A petition for rehearing and rehearing *en banc* was filed and denied January 30, 1992. This petition is sought within 90 days of judgment pursuant to 28 U.S.C. 2101(c).

CONSTITUTIONAL PROVISION INVOLVED

Article III, §2 of the United States Constitution provides:

> The judicial power shall extend ... to all cases of admiralty and maritime jurisdiction.

STATUTES INVOLVED

46 U.S.C. §§1300-1315, Carriage of Goods by Sea Act.

46 U.S.C. §1300. Bills of lading subject to chapter.

> Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this chapter.

46 U.S.C. §1301(b). Definitions.

> When used in this chapter—
>
> (b) The term "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

46 U.S.C. §1302. Duties and rights of carrier.

> Subject to the provision of section 1306 of this title, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the

rights and immunities set forth in sections 1303 and 1304 of this title.

46 U.S.C. §1303(6). Responsibilities and liabilities of carrier and ship.

(6) Notice of loss or damage; limitation of actions. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: *Provided*, That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

46 U.S.C. §1304. Rights and immunities of carrier and ship.

(4) Deviations. Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *Provided, however,* That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

(5) Amount of liability; valuation of cargo. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided,* That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been

knowingly and fraudulently misstated by the shipper in the bill of lading.

46 U.S.C. §1305. Surrender of rights; increase of liabilities; charter parties; general average.

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under this chapter, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provision of this chapter shall not be applicable to charter parties; but if bills of lading are issued in the case of a ship under a charter party, they shall comply with the terms of this chapter. Nothing in this chapter shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

46 U.S.C. §1312. Scope of chapter; "United States"; "foreign trade".

This chapter shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. As used in this chapter the term "United States" includes its districts, territories, and possessions. The term "foreign trade" means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this chapter shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possession: *Provided, however,* That any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an expressed statement that it shall be subject to the provisions of this chapter, shall be subjected hereto as fully as if subject hereto by the express provisions of this chapter: *Provided,*

further, That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this chapter.

STATEMENT OF THE CASE

This litigation arose out of alleged damage to a cargo of palm oil shipped aboard the M/V's TORM RASK and FORT STEELE from Pasir Gudang, Johore to New Orleans, Louisiana between July and October, 1988.

Bunge Edible Oil Corporation (Bunge) purchased the cargo from Malaysian interests. The cargo was loaded aboard the M/V TORM RASK under a clean bill of lading PGNYNOLA-5. The bill of lading provided that the port of loading was Pasir Gudang, Johore and that the port of discharge would be either New York or New Orleans and, therefore, subjecting the contract of carriage to COGSA. The carrying vessel designated in the bill of lading was the M/V TORM RASK.

The M/V TORM RASK was owned by A.S. Dampskibsselskabet TORM (Torm) and chartered to Canadian Pacific (Bermuda), Ltd. However, the decisions as to which cargo would be carried, how they would be carried and handled, was apparently made by other Canadian Pacific companies. Furthermore, the bill of lading issued identified only Canadian Pacific Steamships London as the carrier.

Contrary to the bill of lading, the cargo was discharged by the M/V TORM RASK into shoreside tanks at Rotterdam where it remained for an unknowm period of time. The stop at Rotterdam and discharge of the cargo was not authorized or otherwise mentioned on the bill of lading. Furthermore, the stop at Rotterdam and the handling of the cargo was not merely a transshipment of the cargo from one ship to another, but was a complete discharge of the cargo from the TORM RASK to a shoreside tank in Rotterdam with subsequent loading on the FORT

STEELE for delivery to Barge MMI-307 in Reserve, Louisiana. This sequence of events drastically increased the voyage time for the cargo well above the time it would have taken if it had been carried direct to New Orleans on the TORM RASK, as originally planned, contracted for and set out in the bill of lading. Furthermore, the transfer of the cargo from a ship tank to a shore tank to another ship tank, then to a barge tank and ultimately to a shoreside tank drastically increased the risk of contamination and overheating of the cargo over and above that normally to be expected. Thereafter, the cargo was loaded into the M/V FORT STEELE for oncarriage to New Orleans. The M/V FORT STEELE was owned, operated, and/or chartered by one or more of the Canadian Pacific companies.

Thereafter, the M/V FORT STEELE arrived at Reserve, Louisiana where it discharged the cargo into Barge MMI-307 on or about October 3, 1988.

Immediately after the cargo was discharged from the FORT STEELE, the Canadian Pacific companies were placed on notice of damage to the cargo. Torm was notified of the claim for the first time on approximately March 27, 1989, Thereafter, considerable correspondence was exchanged, mostly from cargo interests to the Canadian Pacific interests, concerning the carriage of the cargo, possibilities of settlement, and routine extensions for suit time. Most of these requests by the cargo interests were completely ignored by the Canadian Pacific parties.

Ultimately, suit was filed in this matter on December 29, 1989, more than one year after delivery of the cargo. Over ten months after the lawsuit was filed, the Respondents filed Motions For Summary Judgment seeking to have the Complaint dismissed as time barred under the provisions of the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1301, et seq. Bunge Edible Oil Corporation defended against the Motions for Summary Judgment by arguing:

1. An unreasonable deviation was committed and, therefore, none of the parties could rely on the one year

time for suit defense contained in section § 1303(6) of the act.

2. A factual dispute existed as to which of the Respondents were "COGSA carriers" entitled to rely on the one year time for suit defense in the Carriage of Goods by Sea Act.

3. At least with respect to the Canadian Pacific companies, they fraudulently concealed the identidy of the true Canadian Pacific interests involved with the shipment of the cargo which action tolled the running of the one year period contained in the Carriage of Goods by Sea Act.

4. The Respondents granted extensions of suit time the conditions of which were satisfied by the cargo interests, and since suit was within the time extension, it was timely.

The District Court entered Orders and Reasons for Judgment on January 15, 1991 wherein it concluded the following:

1. Respondent, Torm, was not a COGSA carrier entitled to assert the one year time for suit defense of § 1303(6).

2. It was undisputed that Canadian Pacific (Bermuda), Ltd. was the COGSA carrier entitled to rely on the one year time for suit defense of § 1303(6).

3. The M/V's TORM RASK and FORT STEELE were COGSA carriers entitled to rely on the one year time for suit defense of § 1303(6).

4. That an unreasonable deviation does not prevent a "COGSA carrier" from asserting the one year time for suit defense contained in the Carriage of Goods by Sea Act.

5. That petitioner did not institute suit within the one year period provided by the Carriage of Goods by Sea Act.

6. That although the extensions of suit time granted by the Respondents were valid, Bunge did not timely

satisfy the conditions contained in the extensions.

7. That the petitioner's claim was time barred as to Canadian Pacific (Bermuda), Ltd. and the M/V's TORM RASK and FORT STEELE under § 1303(6) of the Carriage of Goods by Sea Act.

Thereafter, on January 28, 1991, the District Court entered a Final Judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure dismissing Bunge's claims against Canadian Pacific (Bermuda), Ltd. and the M/V's TORM RASK and FORT STEELE as time barred. Subsequently, on January 31, 1991, Bunge appealed the rulings of the District Court to the United States Court of Appeals for the Fifth Circuit which affirmed per curiam.

REASONS FOR GRANTING THE WRIT

(1) Pre-COGSA Law of Deviation

For over one hundred and fifty years, American and English Courts have held carriers liable for cargo lost or damaged as a result of an unjustified deviation. Friedell, *The Deviating Ship,* 32 Hastings Law Journal 1535 (1990). Under American and English common law, an unreasonable deviation is a gross breach of contract resulting in the carrier's losing the protection of all defenses, exceptions and limitations which it inserted in the bill of lading for its benefit. *The Propeller Niagara v. Cordes,* 62 U.S. (21 How.) 7 (1858); *The Delaware,* 81 U.S. (14 Wall.) 579 (1872); *St. John N.F. Shipping Corp. v. S.A. Companhia Geral Commercial,* 44 S.Ct. 30 (U.S. 1923); *The Willdomino,* 47 S.Ct. 261 (U.S. 1927); *The Malcolm Baxter, Jr.* 48 S.Ct 516 (U.S. 1928); *Benedict on Admiralty,* Vol. 2A, Chp. XII, Sec. 121; Gilmore and Black, *The Law of Admiralty, Chp. III, pg. 177, (2nd Ed. 1975); Deviation and the Package Limitation,* 68 Tex. L. Rev. 976 (1990); *The Pelotas,* 43 F.2d 571 (E.D. La. 1930), aff'd 66 F.2d 75 (5th Cir. 1933); *G.W. Sheldon & Co. v. Hamburg Amerikanische,* 28 F.2d 249 (3rd Cir. 1928).

The early rationale for the "deviation doctrine" and

its effect evolved from concepts of marine cargo insurance and the idea that a deviation created a different voyage "and thus constituted a breach of the original bill of lading." 68 Tex. La. Rev. 977-78 (1990). "As a result of the carrier's breach, the courts refused to enforce **any** of the provisions in the bill of lading that protected the carrier." *Id.*

Today, the policy rationale for deviation-based liability is not related to concepts of insurance. Rather, it is still associated with the concept of a "breach of contract" and the idea that "deviations are wrongful because they increase the risk to cargo beyond that permitted in the contract of carriage." Schoenbaum, *Admiralty and Maritime Law,* Chp. 9, pg. 363 (1987).

Accordingly, before "Congress enacted COGSA, United States courts agreed that a deviation ousted the contract of carriage and its exculpatory provisions." 68 Tex. L. Rev. 976, 979 (1990). This proposition, long entrenched in the maritime law, was succinctly stated by Justice McReynolds in *St. Johns N.F. Shipping Corporation v. S.A. Companhia Geral Commercial,* 263 U.S. 119 (1923). After finding that the carrier had deviated, he stated:

> She accordingly became liable as for a deviation, cannot escape by reason of the relieving clauses inserted in the bill of lading for her benefit... *Id.* at 124.

There were no exceptions to the rule: a carrier that deviated could not rely on **any** provision in its bill of lading that provided a defense to the claim of the cargo owner. In fact, the only defense available to a deviating carrier to avoid liability was to show that there had been no damage or that the damage would have taken place even absent the deviation. See, *Unreasonable Deviation under COGSA,* 9 Journal of Maritime Law and Commerce 481, 483 (1978); *The Deviating Ship,* 32 Hastings Law Journal 1535, 1539 (1981); *The Hermosa,* 57 F.2d 20 (9th Cir. 1932).

In 1851, Congress enacted the Limitation of Liability

Act, 46 U.S.C. §§ 181-189. This statutory scheme limited or completely exculpated a carrier from liability for damages caused by certain events. A question which arose was the effect an unreasonable deviation would have on the carrier's right to assert the defenses and limitations contained in the Limitation of Liability Act, 46 U.S.C. §§ 181-189. The majority of courts faced with the issue have concluded that a carrier's deviation strips it of the statutory defenses contained in the Limitation of Liability Act. See, *Benedict on Admiralty,* 2A, Chp. XII, sec. 121, 127 & 128; *The Pelotas,* 43 F.2d 571 (E.D. La. 1930) aff'd 66 F.2d 75 (5th Cir. 1933); *The Silvercypress,* 63 F.Supp. 452 (S.D.N.Y. 1943), aff'd 143 F.2d 462 (2nd Cir. 1944); *The Elizabeth Dantzler,* 263 Fed. 596 (E.D. Va. 1920); *The Indrapura,* 171 Fed. 929 (D. Oregon 1909); *The Frederick Luchenbach,* 15 F.2d 241 (S.D.N.Y. 1926). Accordingly, despite statutory enactments, the great majority of courts continued to hold that an unreasonable deviation took from the carrier any right to rely on any defenses, whether contractual or statutory.

In 1893, Congress again entered the ring of carrier/shipper relations by enacting the Harter Act, 46 U.S.C. §§190-195. Of course, the Harter Act contained statutory defenses, exemptions and limitations which benefited the carrier under circumstances. Despite the statutory nature of these defenses, the majority of courts had no problem concluding that an unreasonable deviation stripped from the carrier the right to assert any and all of the defenses, exemptions and limitations contained therein which inured to its benefit, See, *Benedict on Admiralty,* Vol. 2A, Chp. XII, sec. 121; *The Pelotas,* 43 F.2d 571 (E.D. La. 1930) aff'd 66 F.2d 75 (5th Cir. 1933); *Fass v. U.S. Shipping,* 9 F.2d 1004 (D.C. Calif, 1924); *U.S. v. City of New York,* 8 F.2d 270 (S.D.N.Y. 1923).

Based on the foregoing, it is clear that prior to the enactment of COGSA, 46 U.S.C. §§ 1300 et. seq. in 1936, a carrier that committed an unreasonable deviation lost "the right to rely on any of the provisions in the bill of lading" or statutes in its favor. Longley, *Common Carriage*

of Cargo, §12.01 [7] - [8], pgs. 118-119 (1967); *The Malcolm Baxter, Jr.*, 48 S.Ct. 516 (U.S. 1928); *The Willdomino*, 47 S.Ct. 261 (U.S. 1927); *St. Johns N.F. Shipping Corp. v. S.A. Companhia Geral Commercial*, 44 S.Ct. 30 (U.S. 1923); *The Delaware*, 81 U.S. (14 Wall.) 579 (1872)l *The Pelotas*, 43 F.2d 571 (E.D. La. 1930) aff'd 66 F.2d 75 (5th Cir. 1933); *The Sarnia*, 278 Fed. 459 (2nd Cir. 1921); *Fass v. U.S. Shipping*, 9 F.2d 1004 (D.C. Calif. 1924); U.S. v. City of New York, 8 F.2d 270 (S.D.N.Y. 1923).

Of course, before COGSA was enacted, there did not exist a statutory provision limiting the time within a shipper could sue a carrier for cargo damage. In the absence of a valid and unforceable "time for suit" clause in the bill of lading, the shipper's action was governed by the doctrine of *laches*.

Only three reported cases were found, decided prior to the enactment of COGSA, dealing with the effect a deviation had on a time for suit provision in a bill of lading.

In *Sidney Blumenthal & Co., Inc. v. United States*, 21 F.2d 798 (S.D.N.Y. 1927), aff'd in part, rev'd in part on other grounds, 30 F.2d 247 (2nd Cir. 1929), the carrier moved to dismiss the shipper's claim brought after the nine month period stipulated in the bill of lading. It was stipulated that a deviation occurred but the carrier argued that there existed a distinction between the time for suit defense and other defenses in the bill of lading. According to the carrier, the time for suit defense, unlike all other defenses, was not lost because of a deviation. The Court responded:

> There is no basis in law for such a difference. Deviation is deviation, and its effect, whenever it occurs is the same; this effect is to abrogate the contract... *Id.* at 798.

Accordingly, the argument that a "time for suit" defense was different from other defenses voided by a deviation was flatly rejected. Consequently, the shipper's action against the carrier was not time barred.

In *Rudy Patrick Seed Co. v. Kokusai Kisen Kabushiki Kaisha*, 12 F.Supp. 727 (S.D.N.Y. 1935), rev'd on other grounds, 85 F.2d 17 (2nd Cir. 1936), a clause in the bill of lading obligated the shipper to give notice of the claim to the carrier within 30 days after the goods were delivered and limited the time for suit to one year. The shipper failed to comply with either and the carrier moved to dismiss the claim. The Court explained:

> This defense is not available to respondent, for where a shipowner breaches the contract by an unjustifiable deviation, it may not claim the benefit of restricted clauses in the contract. *Id.* at 731.

Accordingly, the court denied the carrier's motion and concluded that the shipper's claim was timely. For the same result, see also, *General Electric Co. v. Argonaut S.S. Line*, 7 F.Supp. 710 (E.D.N.Y. 1934).

Undoubtedly, these cases along with other pre-COGSA cases clearly demonstrate that an unreasonable deviation deprived the carrier of **any** and **all** defenses, limitations or exceptions contained in the applicable statutes and in the bill of lading, including time for suit provisions.

(2) Enactment of COGSA - Clear Congressional Intent

In 1936, Congress passed the Carriage of Goods by Sea Act, 46 U.S.C. §§1300 et. seq. COGSA is based on, and is an enactment of, the Hague Rules. 68 Tex. L. Rev. 977, 978 (1990): *Robert C. Herd & Co. v. Keawill Machinery*, 359 U.S. 297 (1959). Unlike the Harter Act, 46 U.S.C. §§190-195, COGSA containes a provision limiting the time for suit to one year from the time the cargo is delivered or should have been delivered. See 46 U.S.C. §1303(6). Section 1303(6) of COGSA provides in pertinent part:

> In any event the carrier and the ship shall be discharged from all liability in respect of loss or

> damage unless suit is brought within the one year after delivery of the goods or the date when the goods should have been delivered...

Accordingly, with the enactment of COGSA came a statutory time for suit defense available to a carrier. In addition, Congress codified a $500.00 per package limitation. See §1304(5). Neither of the defenses or limitations were contained in the predecessor Harter Act, 46 U.S.C. §191-195. Nevertheless, these types of provisions were commonly inserted in bills of lading prior to COGSA. Notwithstanding, courts consistently held that the carrier who deviated could not rely on such clauses. Consequently, the issue after COGSA's enactment is whether Congress intended to change the well established law of deviation so as to preserve the time for suit defense even if the carrier deviated.

The first place to start in determining whether Congress intended a change in the Pre-COGSA law of deviation is with the statute itself. One need look no further than § 1304(4) which states in pertinent part:

> Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation *shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage.* (Emphasis added).

Clearly, Congress has expressly stated that a reasonable deviation does not result in a breach of COGSA or the bill of lading. This provision, clearly worded, leaves no doubt that Congress intended the contrary: *an unreasonable deviation is "an infringement or breach" of COGSA as well as the bill of lading.* 46 U.S.C. §1304(4). See also, Longley, *Common Carriage of Cargo,* §12.02[4], pg. 129 (1967); *The Law of Maritime Deviation,* 47 Tul. L. Rev. 155, 179 (1972). Congress thus expressed its intent by the clear words in §1304(4) as to the effect an unreasonable deviation would have after COGSA - infringement or breach, of the contract of carriage and COGSA itself. This

provision is nothing more than a codification of the pre-COGSA rule that an unreasonable deviation breached or abrogated the contract of carriage. However, §1304(4) goes further. It states that an unreasonable deviation also has the effect of "infringing or breaching" COGSA itself. See Longley, *supra*, at pg. 128; *The Law of Maritime Deviation, supra*, at pg. 179. Accordingly, the carrier who commits an unreasonable deviation cannot invoke any provision of its bill of lading or COGSA in its favor. Of course, the "time for suit" provision is part of COGSA. See §1303(6). Because COGSA is breached by an unreasonable deviation, the carrier Respondents cannot rely on any of its provisions.

(3) Post-COGSA Case Law and Commentators on Congressional Intent

Despite the unequivocal Congressional intent contained in §1304(4), courts have been called upon to determine, almost on a case-by-case basis, what effect, if any, COGSA had on the pre-COGSA law of deviation. Most of the cases reported since enactment of COGSA have been concerned with the $500.00 per package limitation in §1304(5). See e.g. *Jones v. The Flying Clipper,* 116 F.Supp. 386 (S.D.N.Y. 1953); *Searoad Shipping Co. v. E.I. du Pont de Nemours & Co.,* 361 F.2d 833 (5th Cir. 1966); *Spartus Corp. v. S/S Yafo,* 590 F.2d 1310 (5th Cir. 1979); *Calmaquip Engineering v. West Coast Carriers Ltd.,* 650 F.2d 633 (5th Cir. 1981); *C.A. Articulas Nacionales v. M/V Aragua,* 756 F.2d 1156 (5th Cir. 1985); *Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer,* 422 F.2d 7 (2nd Cir. 1969), cert den. 397 U.S. 964 (1970); *Ilgian Integrated Steel Mills, Inc. v. S.S. John Weyerhauser,* 507 F.2d 68 (2nd Cir. 1974), cert. den., 421 U.S. 965 (1975); *Atlantic Mutual Insurance Co. v. Poseidon Schiffahrt,* 313 F.2d 872 (7th Cir. 1963), cert. den. 375 U.S. 819 (1963); *Nemeth v. General Steamship Corp.,* 694 F.2d 609 (9th Cir. 1982). All circuit courts that have faced the issue, except the Seventh Circuit, have held that Congress, in enacting COGSA, did not alter Pre-COGSA law relating to deviation. The position of the great majori-

ty of the courts, including the Fifth Circuit, is based on the perception of Congress' clear intent. The great majority of courts have consistently "found that Congress did not intend to supplant the existing law of deviation." *Spartus Corp. v. S/S Yafo,* 590 F.2d 1310, 1316 (5th Cir. 1979); *C.A. Articulos Nacionales v. M/V Aragua,* 756 F.2d 1156, 1159 (5th Cir. 1985); *Berisford Metals Corporation v. S/S Salvador,* 779 F.2d 841, 848 (2nd Cir. 1985).

Judge Weinfeld in *Jones v. The Flying Clipper,* 116 F.Supp. 386, 389 (S.D.N.Y. 1953) best summerized it when he stated:

> There is nothing in the history of [COGSA] to indicate that Congress by fixing the limitation at $500.00 intended to displace the doctrine of unjustifiable deviation which was so firmly entrenched in maritime law. Such a drastic change in the existing law, with its far reaching consequences in the commercial and financial world would have been expressed in clear and unmistakable terms.

Accordingly, Judge Weinfeld "rejected the [carrier's] arguments of intent by Congress to change Pre-COGSA law, the distinction between statutory and contractual [defenses], and the 'in any event' distinction, and held specifically that the $500.00 package limit did not apply, while emphasizing that *all* protections of the bill of lading and COGSA were forfeited." See, *Unreasonable Deviation under COGSA,* 9 Journal of Maritime Law and Commerce 481, 487 (1978).

Since *Jones v. The Flying Clipper, supra,* the Fifth Circuit, as well as the majority of other Circuits, have adopted its reasoning to conclude that an unreasonable deviation deprives the carrier of the benefit of all defenses, exceptions or limitations contained in the bill of lading or COGSA. See e.g., *Searoad Shipping Co. v. E.I. de Pont de Nemours and Co.,* 361 F.2d 833 (5th Cir. 1966); *Spartus v. S/S Yafo,* 590 F.2d 1310 (5th Cir. 1979); *Calmaquip*

Engineering v. West Coast Carriers Ltd., 650 F.2d 633 (5th Cir. 1981); *C.A. Articulos Nacionales v. M/V Aragua*, 756 F.2d 1156 (5th Cir. 1985); *Encyclopaedia Britannica Inc. v. S.S. Hong Kong Producer*, 422 F.2d 7 (2nd Cir. 1969), cert. den., 397 U.S. 964 (1970); *Ilgian Integrated Steel Mills, Inc. v. S.S. John Weyerhaeuser*, 507 F.2d 68 (2nd Cir. 1974), cert. den. 421 U.S. 965 (1975); *Berisford Metals Corp. v. S/S Salvador*, 779 F.2d 841 (2nd Cir. 1985); *C.A. La Seguridad v. Delta Steamship Lines*, 721 F.2d 322 (11th Cir. 1983); *Aetna Insurance Co. v. M/V Lash Italia*, 858 F.2d 190 (4th Cir. 1988); *Nemeth v. General Steamship Corp.*, 694 F.2d 609 (9th Cir. 1982).

The English rule of law is consistent with the overwhelming majority view set forth above. The leading English case involving the British Carriage of Goods by Sea Act and the effect of a deviation is *Stag Line Ltd. v. Foscolo, Mango and Co., (The Ixia)*, [1932] A.C. 328 (1931). There, the House of Lords noted that an unreasonable deviation removed **all** protections provided by the bill of lading prior to enactment of the British COGSA in 1924. The various opinions of their Lordships is unequivocal that the Act's framers did not intend to alter the Pre-Act law of deviation. As Lord Atkin explained:

> I pause here to say that I find no substance in the contention faintly made by the defendants that an unauthorized deviation would not displace the statutory exceptions contained in the Carriage of Goods by Sea Act. I am satisfied that the general principles of English law are still applicable to the carriage of goods by sea except as modified by the Act: and I can find nothing in the Act which makes its statutory exceptions apply to a voyage which is not the voyage the subject of 'the contract of carriage of goods by sea' to which the Act applies. *Id.* at 340.

This is precisely the same principle stated by Congress in § 1304(4) of the Act as well as the overwhelming

majority of subsequent American cases. That is, A DEVIATION ABROGATES THE CONTRACT AND WHEN THE CONTRACT GOES, THE ACT, WHICH APPLIES TO THE CONTRACT, NO LONGER APPLIES. CONGRESS REAFFIRMS THIS PRINCIPLE IN §1304(4) OF COGSA. This provision and most of the British Act is identical to COGSA. *Benedict on Admiralty.* Vol. 2A, Chp. XII, §128, pg. 12-30. As stated by Benedict, an authority on the subject:

> As the language of subparagraph (4) of Section 4 of COGSA is pregnant with the positive meaning that an unreasonable deviation is an infringement and breach of this act, it seems logical, as was held in the House of Lords in the Ixia, that when a departure from the contractual voyage is an unreasonable deviation, the carrier is not entitled to **any** of the exemptions or limitations provided by [COGSA]. *Benedict on Admiralty,* Vol. 2A, Chp. XII, §128, pg. 12-30. (Emphasis added).

Uniformity in the interpretation of the Hague Rules throughout the commercial jurisdictions of the maritime world and in international trade compels this Court to decide this issue in conformity with the House of Lords with the ultimate supervision of our major trading partners.

Gilmore and Black in talking about the exemptions contained in §1304 of COGSA, states that not only are these defenses or exemptions vitiated by an unreasonable diviation, but that "a carrier whose deviation has contributed to the causing of the loss ought not to be given the benefit of **any** of the other exemptions. Gilmore & Black. *The Law of Admiralty,* Chp. III, pg.180 (2nd Ed. 1975). (Emphasis added).

Another commentator, in accord with the above proposition, states:

> The consequences of deviation under COGSA are harsh. The majority view is that an unreasonable deviation is a fundamental breach of the contract of carriage. As a fundamental breach which goes to the 'very essence' of the undertaking, the carrier is deprived of reliance on the provisions of the contract, including the provisions of COGSA. Schoenbaum, *Admiralty and Maritime Law,* Chp. 9, pg. 365 (1987).

Still another commentator suggests:

> ...when a departure from the contractual voyage is an unreasonable deviation, the carrier is not entitled to *any* of the exemptions or limitations provided by [COGSA]." Longley, *Common Carriage of Cargo,* § 12.02 [4],pg. 131 (1967). (Emphasis added).

Finally, it is well documented that COGSA is the domestic enactment of the Hague Rules. Tetley, an authority on both the Hague Rules and COGSA, writes:

Thus, the carrier who commits an unreasonable (intentional) deviation or quasi-deviation will lose in theory:

(1) the package limitation;

(ii) **the time for suit defense;**

(iii) the defenses of due diligence under art. 4(2)(a) to (q);

(iv) the defense of due diligence under art. 3(1);

(v) other benefits under the contract. William Tetley, Marine Cargo Claims, pgs. 117-118, 746 (3rd. Ed. 1988).

According to Tetley, courts which have decided that an unreasonable deviation did not void the above defenses are "inconsistent and, in the writer's view, based on an erroneous reading of the text of the Hague Rules or COGSA." *Id.* at 118.

(4) THE "IN ANY EVENT" LANGUAGE OF §1303(6)

Section 1303(6) of COGSA contains the notice and time for suit provisions. It starts out by stating that unless written notice is given to the carrier of damage to the cargo upon delivery, there is a presumption that the carrier delivered the goods in the same condition as when received. See §1303(6). Thereafter, the provision states in part that "[i]n any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods..." See §1303(6). It is submitted that the "in any event" language is merely addressing the preceding notice requirements. The meaning is clear: A failure to give notice will not bar the claim "in any event" provided suit is filed within one year of delivery. Accordingly, the "in any event" language used in §1303(6) does not encompass or otherwise address deviation.

In addition, literally dozens of courts, including the Fifth Circuit, have been called upon to determine the effect of the "in any event" language in §1304(5) dealing with the package limitation. Again, the great majority of the courts faced with the question have concluded that the "in any event" language of §1304(5) did nothing to save the $500.00 per package defense for a deviating carrier. See e.g., *Jones v. Flying Clipper,* 116 F.Supp. 386 (S.D.N.Y. 1953); *Searoad Shipping Co. v. E.I. du Pont de Nemours & Co.,* 361 F.2d 833 (5th Cir. 1966); *Spartus Corp. v. S/S Yafo,* 590 F.2d 1310 (5th Cir. 1979); *Calmaquip Engineering v. West Coast Carriers Ltd.,* 650 F.2d 633 (5th Cir. 1981); *C.A. Articulos Nacionales v. M/V Aragua,* 756 F.2d 1156 (5th Cir. 1985); *Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer,* 422 F.2d 7 (2nd Cir. 1969), cert. den., 397 U.S. 964 (1970); *Ilgian Integrated Steel Mills Inc., v. S.S. John Weyerhaueser,* 507 F.2d 68 (2nd Cir. 1974), cert. den. 421 U.S. 965 (1975); *Berisford Metals Corp. v. S/S Salvador,* 779 F.2d 841 (2nd Cir. 1985); *C.A. La Seguridad v. Delta*

Steamship Lines, 721 F.2d 322 (11th Cir. 1983); *Aetna Insurance Co. v. M/V Lash Italia*, 858 F.2d 190 (4th Cir. 1988); *Nemeth v. General Steamship Corp.*, 694 F.2d 609 (9th Cir. 1982). Only the Seventh Circuit has reached a contrary result. See *Atlantic Mutual Insurance Co. v. Poseidon Schiffahrt*, 313 F.2d 872 (7th Cir. 1963), cert. den., 375 U.S. 819 (1963).

Accordingly, the "in any event" language in §1303(6) cannot be deemed to save the time for suit defense when a carrier commits an unreasonable deviation.

(5) POST-COGSA CASES DECIDING THE EFFECT OF AN UNREASONABLE DEVIATION ON THE TIME FOR SUIT DEFENSE

As shown heretofore, courts faced with time for suit clauses in bills of lading prior to COGSA refused to allow a deviating carrier to use it as a defense to the shipper's claims. Numerous courts have also addressed the effect of an unreasonable deviation post-COGSA on time for suit provisions in contracts and in §1303(6). Clearly, the majority rule holds true to Pre-COGSA case law to the effect that an unreasonable deviation deprives the carrier of all defenses, limitations and exceptions, whether contractual or statutory, including the one year time for suit defense in §1303(6).

In *United States v. Wessel Duval & Co., Inc.*, 115 F.Supp. 678 (S.D.N.Y. 1953), a charter party existed between a time and bareboat charterer. The charter agreement incorporated the provisions of COGSA. The bareboat charterer attempted to dismiss the time charterer's claim as time barred under §1303(6) of COGSA. Relying on Pre-COGSA cases, the court concluded that the deviation deprived the bareboat charterer of the defense. In reaching this result, the court stated, with respect to §1303(6), that:

> Those words, "in any event" may well result in preserving this statutory limitation even

> though the ship has been guilty of a deviation. Here, however, the Act has effect only as an agreement of the parties...*Id.* at 684.

In this case, the District Court below relied on this statement in *Wessel Duval* in an attempt to distinguish it from this case and to conclude that it did not address the effect of a deviation on §1303(6) when COGSA applied of its own force. This is a distinction without substance and completely disregards the clear mandates of §1312. Section 1312 provides in pertinent part:

> That any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea..., containing an express statement that it shall be subject to the provisions of this chapter, *shall be subjected hereto as fully as if subject hereto by the express provisions of this chapter*...(Emphasis added).

Accordingly, once a contract incorporates COGSA, COGSA is to apply as if it applied of its own force. Consequently, the fact that COGSA applied in *Wessel Duval* by virtue of a contract does not distinguish it from the case presented herein.

In *Insurance Company of North America v. S.S. Exminster,* 127 F.Supp. 541 (S.D.N.Y. 1954), the carrier issued a bill of lading stating that all of the cargo covered therein was shipped on board in good condition. In fact, a substantial amount of the cargo had never been loaded. The shipper brought suit more than one year after delivery of the cargo and the carrier sought to have it dismissed as time barred under both §1303(6) and a bill of lading provision limiting the time for suit. Although not a true deviation case, the court concluded that the carrier's misrepresentation was a serious breach of the contract and refused to allow the carrier to plead time bar.

The decision in *Minex v. International Trading Com-*

pany of Virginia, 303 F.Supp. 205 (E.D. Va. 1969), indicated that had an unreasonable deviation occurred, the time for suit defense would be unavailable.

In *Cerro Sales Corp. v. Atlantic Marine Enterprises, Inc.*, 403 F.Supp. 562 (S.D.N.Y. 1975), a charter party between plaintiff and defendants incorporated COGSA. When plaintiff sued for the loss of cargo more than one year after delivery, defendants moved to dismiss based on the defense of time bar of §1303(6). The court concluded that an unreasonable deviation "would deprive the shipowner of the protection of the one-year statute of limitations provision of COGSA." *Id.* at 566.

In *Allstate Insurance Company v. International Shipping Corp.*, 1982 A.M.C. 1763 (S.D. Fla. 1981), aff'd 703 F.2d 497 (11th Cir. 1983), the shipper sued the carrier for cargo damage more than one year from delivery. COGSA applied of its own force. The carrier argued that the claim was time-barred under §1303(6) and sought to dismiss the claim. The court responded:

> [The carrier's] actions constitute an unreasonable deviation, nullifying any limitations and exemptions which [the carrier] might claim under its bill of lading and the Carriage of Goods by Sea Act. See *Spartus Corp. v. S/S Yafo*, 1979 A.M.C. 2294, 2303-04, 590 F.2d 1310, 1317 (5th Cir. 1979). Thus the carrier may not claim the benefit of COGSA's one-year statute of limitations. [citations omitted]. *Id.* at 1769.

In *Italia Di Navigazione v. M/V Hermes I*, 1984 A.M.C. 485 (S.D.N.Y. 1983), aff'd 724 F.2d 21 (2nd Cir. 1983), although a deviation was not found, the court suggested that a deviation could "operate to deprive the carrier of the benefit of the COGSA one-year limitations period." *Id.* at 487 (citations omitted.)

In *Yutana Barge Lines, Inc. v. Northland Services, Inc.*, 574 F.Supp. 1003 (W.D. Wash. 1983), after finding

that the carrier unreasonably deviated, the Court stated:

> ...an unreasonable deviation deprives the carrier of the protection of both contractual and statutory liability limitations. *Nemeth v. General S.S. Corp.*, 694 F.2d 609, 612-13 (9th Cir. 1982).
>
> * * * * * * * * * *
>
> Since such an unreasonable deviation deprives the carrier of contractual and statutory limitations of liability, the court holds that defendant may not rely upon its (1) time bar, (2) package/customary freight unit limitation, and peril of the sea defenses. *Id.* at 1005-1006.

Finally, the most recent case discovered adhering to the above principle is *Northwestern National Insurance Company v. Miles A. Galin*, 1987 U.S. Dist. Lexis 10927, No. 85 Civ. 1832 (S.D.N.Y. 1987). In a motion for summary judgment, the court denied defendant's motion to dismiss the claim as time barred under §1303(6). The court simply stated:

> An unreasonable deviation deprives the ocean carrier of COGSA's one-year time limitation. (Citation Omitted).

The court went on to apply the doctrine of *laches* to conclude that the shipper's action was timely.

Finally, the last case to consider deals not with the time for suit defense in §1303(6) but the presumption of good order at delivery defense of §1303(6). In *Hato La Vergarena v. S.S. Susaa*, 1973 A.M.C. 195 (S.D.N.Y. 1972), the shipper sued for damage to cargo but failed to put the carrier on notice as provided by §1303(6). As a result, the carrier attempted to set up the defense that lacking proper notice as provided in §1303(6), it was presumed that the cargo was delivered in good order. However, the court found that the carrier unreasonably deviated and stated:

> ...where the carrier has committed a 'deviation', it thereby forfeits defenses based on the bill of lading and statutory exceptions. *Id.* at 196 (Citations Omitted).

Consequently, the court concluded that the carrier could not rely on the presumption of good order at delivery defense in §1303(6).

In sum, the cases demonstrate that a carrier who unreasonably deviates cannot rely on **any** defense, limitation or exceptions, whether contractual or statutory, which inures to its benefit. Because the time for suit provision of §1303(6) is a defense, limitation or exception, the deviating carrier cannot rely on it to defeat a cargo claim. Instead, *laches* governs and under that doctrine, Bunge's claims are timely.

In closing, Petitioner refers this Court to the District Court's citation and reliance on *Switzerland General Insurance Co. v. Navigazione Libera Triestina, S.A.*, 91 F.2d 960, 963 (2nd Cir. 1944) in support of its conclusion that an unreasonable deviation does not deprive the carrier of the time for suit defense of §1303(6). *Switzerland* involved the application of the British Carriage of Goods by Sea Act. Judge Hand concluded that the shipper failed to show an unreasonable deviation. Nevertheless, the shipper contended that the vessel's conduct in fraudulently issuing a bill of lading constituted an unreasonable deviation depriving the carrier of the time for suit defense in the bill of lading and the British COGSA. The court concluded that no unreasonable deviation was shown. Accordingly, the time for suit defense could be interposed to defeat the claim. Nevertheless, the court also stated:

> Nothing resembling a deviation has been shown to deprive the carrier of the benefit of the limitation...*Id.* at 963.

This statement has been misinterpreted by the district court below as well as other courts to mean that an

unreasonable deviation did not deprive the carrier of the time for suit defense. However, a *careful* reading of the opinion reveals that an unreasonable deviation had not occurred. Accordingly, Judge Hand was merely stating that nothing short of or resembling a deviation has been shown to deprive the carrier of the time for suit defense in the British COGSA. Undoubtedly, an unreasonable deviation deprives a carrier of the time for suit defense contained in the British Act. See, *Stag Line, Ltd. v. Foscolo, Mango and Co., (The Ixia)*, [1932] A.C. 328 (1931).

CONCLUSION

The law of deviation has steadfastly been that an unreasonable deviation prevents a carrier from asserting all defenses, whether contractual or statutory. Congressional intent in the enactment of the Carriage of Goods by Sea Act did not change the Pre-COGSA law of deviation. Congress restated it and made it stronger. This Court should not now make exception to this long standing rule of law. To do so, would only invite litigious carriers to unnecessarily increase the burden of litigation by opening the door for them to attempt to carve out other exceptions to the long standing rule of law. Further, a clear, unexcepting rule has "the advantage of a degree of simplicity and certainty which is useful in a practical commercial context." *Unreasonable Deviation under COGSA*, 9 Journal of Maritime Law and Commerce 481, 492-93 (1978). Accordingly, this Court should grant a writ of certiorari and reverse the decision of the District Court and the affirmance of the Court of Appeals which disregards one hundred fifty years of jurisprudence and thus hold fast to the long standing principle and Congressional statement that an unreasonable deviation breaches the contract of carriage and the Carriage of Goods by Sea Act and deprives a carrier of **all defenses contained in a contract or a statute, including the one year time for suit defense.**

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

BUNGE EDIBLE OIL CORPORATION
Plaintiff-Appellant,

v.

M/V's TORM RASK AND FORT STEEL, et al.
Defendant-Appellees.

No. 91-3174

United States Court of Appeals,
Fifth Circuit.

Jan. 2, 1992.

Appeal from the United States District Court
for the Eastern District of Louisiana

Before CLARK, Chief Judge, Williams and Barksdale, Circuit Judges:

PER CURIAM:

I.

Bunge Edible Oil Corporation appeals the district court's dismissal of its admiralty and maritime claims against M/V's Torm Rask and Fort Steel, *in rem*, and Canadian Pacific (Bermuda) Ltd., *in personam*, because Bunge brought suit more than one year after the delivery of the goods. We affirm.

II.

Plaintiff Bunge Edible Oil Corporation (Bunge) contracted with Defendant Canadian Pacific (Bermuda) Ltd. (Canadian Pacific Bermuda) to ship palm oil from Pasir Gudang, Malaysia to the United States. The palm oil was loaded aboard the M/V TORM RASK for delivery to New Orleans or New york. The bill of lading bore the name of another Canadian Pacific entity, Canadian Pacific Steamships London. Defendant A/S Dampskibsselskabet Trom (Torm) owns the TORM RASK and chartered it to Canadian Pacific Bermuda.

Instead of proceeding directly to the United States, the TORM RASK went to Rotterdam and transferred the palm oil into a shoreside tank. The palm oil was then pumped into the M/V FORT STEELE, owned and operated by Canadian Pacific Bermuda. The FORT STEELE transported the palm oil to Reserve, Louisiana where it discharged the oil into Barge MMI-307 on or about October 3, 1988.

Within a week of delivery, Bunge notified the Canadian Pacific entities[1] that the palm oil was damaged, most likely from moisure and heat, and therefore unacceptable.

The underwriters insuring the cargo paid Bunge the total loss of the cargo, less salvage value and turned the claims handling over to Transatlantic Marine Claims Agency (TMCA). Thereafter, TMCA attempted to work the matter out wtih the Canadian Pacific entities abut the contacts were unsuccessful.

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[1] This action involves several Canadian Pacific entities, including Canadian Pacific Bermuda. Bunge asserts that it was unaware of the difference between the different entities when it first contacted them regard-
ing damage to the cargo.

As the date of the one year statute of limitations under the Carriage of Goods by Sea Act, 46 U.S.C. App. §1301 et seq. (COGSA) approached, TMCA asked the Canadian Pacific entities for an extension through and including January 1, 1990. Canadian Pacific Bermuda granted an extension for the TORM RASK (and arguably the FORT STEELE) "subject to owners granting similar." TMCA did not requests a similar extension from Torm until after the one year period had expired and after Canadian Pacific Bermuda had notified TMCA that the one year period had expired, that the condition of the extension had not been met, and therefore the claim was time-barred. In December 1989, Torm granted an extension to TMCA, conditioned on Canadian Pacific Bermuda granting a similar extension. Canadian Pacific Bermuda refused to grant any further extensions or waivers. Bunge filed suit December 29, 1989, nearly two months after the expiration of the COGSA one-year limitation period.

The defendants filed a motion for summary judgment asserting that the COGSA one-year statute of limitations had expired. Bunge argued that defendants were not entitled to the defense of the one-year statute of limitations. 756 F.Supp.261,266 (E.D. La. 1991). The court also found that Bunge failed to fulfill the conditions set forth in the extensions, therefore the one-year provision applied. *Id.* at 268. The court dismissed the actions against the two vessels, *in rem*, and the carrier Canadian Pacific Bermuda. *Id.* at 269. Bunge appeals.

III.

[1] This court reviews the issues presented on appeal from summary judgment *de novo. Trial v. Atchinson, T. & S.F.R. Co.*, 896 F.2d 120, 122 (5th Cir.1990). To warrant summary judgment the evidence must show "that there is

no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

(2)Bunge argues that COGSA's one-year limitation period is inapplicable because Canadian Pacific committed an unreasonable deviation when it discharged the palm oil in Rotterdam and reloaded it upon another ship. Bunge concludes that an unreasonable deviation abrogates the contract of carriage and prohibits Canadian Pacific from asserting any defenses permitted under COGSA. Based on the reasoning set forth by the district court, we disagree. *Bunge Edible Oil,* 756 F.Supp. at 264-67. An unreasonable deviation does not prevent a carrier from invoking the one-year limitations period under COGSA. *Id. See also Francosteel Corp. v. N.V. Nederlandsch Amerikaanwshe, Stoomvart-Maatschappij,* 249 Ca.App.2d 880, 57 Cal. Rptr. 867 (1967), *cert. denied,* 389 U.S. 931, 88 S.Ct. 293, 19 L.Ed.2d 282 (1967).

IV.

[3] Bunge also appeals the district court's determination that the summary judgment record presented no genuine issue of material fact about Canadian Pacific Bermuda's status as a carrier. Bunge argues the facts are disputed and confusing as to which Canadian Pacific defendants are COGSA carriers and therefore summary judgment was inappropriate. We disagree.

The distsrict court correctly stated that "Canadian Pacific admits that Canadian Pacific Bermuda entered into the contract of carriage with Bunge, and Bunge does not refute this fact." *Bunge Edible Oil,* 756 F.Supp. at 268. In his deposition, Mr. stanley Marchant repeatedly states that Canadian Pacific Bermuda issued the bill of lading and

was the charterer of the TORM RASK. Throughout their motion for summary judgment and statement of uncontested facts, the Canadian Pacific entities assert that Canadian Pacific Bermuda was the charterer of the TORM RASK.

Bunge's contention that a dispute of fact exists is based solely on the bill of lading which bore the name and logs of Canadian Pacific Steamships London. Marchant, however, adequately explained the reason for Canadian Pacific Bermuda's use of this bill of lading form and Bunge did not present any evidence to contradict this explanation.

Canadian Pacific Bermuda satisfied its obligation to show that there were not factual issues regarding Canadian Pacific Bermuda's status as a carrier. *See Russ v. International Paper Co.*, 943 F.2d 589, 591-92 (5th Cir. 1991). Thereafter, Bunge failed to present any evidence contradicting the explanation offered by Canadian Pacific Bermuda. Rather, Bunge presented excerpts from Marchant's deposition which supported Canadian Pacific Bermuda's assertions that it was the charterer of the TORM RASK and a carrier of the palm oil within the terms of COGSA.

Bunge also argues that other Canadian Pacific entities may be the carrier because they negotiated the bill of lading or controlled the handling of the cargo. The district court did not determine whether any of these other entitles were carriers under COGSA, it merely held there was no dispute as to the fact that Canadian Pacific Bermuda was a carrier. *See* 46 U.S.C. App. § 1301(a) ("The term 'carrier' includes...the charterer who enters into a contract of carriage with a shipper.").

V.

The judgment of the district court is AFFIRMED.

APPENDIX B

BUNGE EDIBLE OIL CORPORATION

VERSUS

M/V's TORM RASK AND FORT STEEL, ET AL

Civ. A. No. 89-5514

United States District Court

E.D. Louisiana

January 15, 1991.

ORDER AND REASONS

FELDMAN, District Judge.

Before the Court are three motions. Defendant Dampskibsselskabet Torm (Dampsk. Torm), owner of the M/V TORM RASK, and the Canadian Pacific Defendants move for a summary judgment that the cargo claim of Bunge Edible Oil Corporation (Bunge) against the defendants is barred by the time limitation period provided in COGSA. The Canadian Pacific defendants also move for an order staying this lawsuit pending arbitration pursuant to a provision of the charter agreement between one of the Canadian Pacific companies and Dampsk. Torm. For the reasons that follow, the motion for summary judgment is GRANTED in part and the motion to compel arbitration is DENIED.

I. MOTION FOR SUMMARY JUDGMENT

A. Statute of Limitations

[1] This motion presents a question never before considered in the Fifth Circuit: Does the one year limitation period of COGSA apply although a deviation in the cargo shipment occurred?

Bunge brings this suit as a shipper of cargo for damages that it says occurred while the cargo, a shipment of palm oil, was in transit to New Orleans, Louisiana. Bunge had a contract of carriage with Canadian Pacific (Bermuda) Ltd. (CPB). The bill of lading issued by CPB does not bear the name Canadian Pacific (Bermuda) Ltd. Instead, it names a sister company. Canadian Pacific Steamships London. The bill of lading reflects that the palm oil was received at Gudang, Johore in apparent good order and condition, and that the port of destination is either New York or New Orleans.

Both Bunge, the shipper, and Dampsk, Torm, the vessel owner, charge that, at the direction of CPB, the Torm Rask docked instead in Rotterdam and the palm oil was discharged into a shoreside tank; it was then pumped from the tank to the M/V STEELE, a vessel owned and operated by another of the Canadian Pacific defendants. CPB, they further contend, then carried the palm oil to Reserve, Louisiana and pumped it into Barge MMI-307 on or about October 3, 1988. Bunge claims that surveyors' tests of the palm oil after delivery revealed that the quality of the palm oil had diminished to a level unacceptable to its consignees. According to Bunge, the surveyors at Reserve concluded that the diminished quality of the palm oil resulted from contamination by moisture and improper overheating of the cargo while en route from Gudang to Reserve. Bunge notified the Canadian Pacific Defendants of its claim for damages to the cargo.

Thereafter, Transatlantic Marine Claims Agency

(TMCA), handling Bunge's claim for cargo damages, made repeated written requests to Canadian Pacific Bulkship Service, Ltd. and Canadian Pacific Steamship for information concerning performance of the contract of carriage and the identity of the Canadian Pacific company involved. The exhibits of record show that Canadian Pacific was far from diligent or cooperative in its responses. Despite the fact taht Bunge made diligent efforts to get information from Canadian Pacific and to engage Canadian Pacific in settlement discussions, passage of one year's time since delivery of the palm oil, and the one year limitation period set forth in COGSA, drew near.

To prevent Bunge's claim for becoming time-barred, TMCA sought an extension of time from Canadian Pacific. Canadian Pacific responded, agreeing to an extension, subject to a similar agreement by Dampsk. Torm.[1] TMCA continued to ask Canadian Pacific for information and dept trying to start settlement talks. On December 8, 1989, TMCA obtained an extension of suit from Dampsk. Torm conditioned on a similar agreement by Canadian Pacific.

Defendants argue that no extension of time was ever granted and that, therefore, Bunge's cargo claim is time-barred by section 3(6) of the Carriage of Goods by Sea Act, 46 U.S.C. App. §1303(6). Bunge counters that COGSA's limitation period is not applicable. When the Canadian Pacific carrier discharged the palm oil at Rotterdam into a shoreside tank and then reloaded it aboard the M/V FORT STEELE, Bunge urges, the carrier committed a *per se* deviation from the contract of carriage. Bunge concludes that the effect of such an unreasonable deviation is to

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[1] In their response to Bunge's request for an extension of time, the Canadian Pacific defendants stated "We hereby grant a time extension up to and including January 1, 1990 without prejudice on behalf of charterers subject to owners granting similar."

abrogate the terms of the contract of carriage and to block the carrier from invoking any defense otherwise permitted under COGSA. Thus, according to Bunge, neither the Canadian Pacific carrier nor any of the other defendants[2] can avail themselves off the COGSA ttime limitation period. The Court disagrees.

Bunge relies on a series of New York district court cases[3] in support of its argument. These district court cases indeed conclude that a deviation, such as the one Bunge points to here, deprives the deviating carrier of the COGSA time limitation defense. *See e.g., Italia Di Nav. v. Hermes 1,* 1984 A.M.C. 485, 564 F.Supp. 492 (S.D. N.Y. 1975). But because the Court concludes that these cases were incorrectly decided, and are flawed doctrinally, the Court does not find them of any precedential value or guidance.

These decisions seem to have been based on an incorrect interpretation or application of precedeant. *United States v. Wessel, Duval & Co.,* 115 F.Supp. 678 (S.D. N.Y. 1953), the district court case relied on in this series of cases as support for the conclusion that a deviation voids the applicability of the limitation period provided in COGSA, does not support such a conclusion. *Cerro,* 403 F.Supp. at 566, *Italia Di Nav.,* 1984 A.M.C. at 487, 564 F.Supp. 492. To the contrary, *Wessel, Duval* stands only for the proposi-

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[2] COGSA does only apply by its terms to carriers.

[3] Among the cases cited by Bunge is also a district court decision from the Southern District of Florida. *Allstate Ins. Co. v. International Shipping Corp.,* 1982 A.M.C. 1763 S.D. Fla. 1981) (carrier's actions constituted an unreasonable deviation, nullifying any limitations available to it under COGSA). Because this case relies on the same line of New York district court decisions as authority for its conclusion, it is unnecessary for the Court to treat it because it is implicitly included in the Court's discussion of the New York cases. *Id.* at 1769.

tion that an unreasonable deviation attributable to a bareboat charterer sued for cargo damage by a time charterer may void the contractual time limitation period contained in the Charter Party. *Wessel, Duval*, 115 F.Supp. at 683.

In *Wessel, Duval*, a time charterer, the United States, sued a bareboat charterer, Wessel Duval, for cargo damage caused by a deviation from the Charter Party attributable to the bareboat charterer. *Id.* The time charterer argued that the "conduct of...the bareboat charterer...was such to deprive it of the benefits of the one year limitation in [COGSA]", which the court held had been incorporated by reference into the Charter Party. *Id.* The time charterer argued that the introductory words "in any event" found in the COGSA's time limitation text mandated that the limitation period apply in all cases, even if a deviation had occurred. Concluding that these seemingly clear and direct words did not preserve the time limitation defense in the face of a deviation, the court explained:

> Those words "in any event" may well result in the preserving this *statutory limitation* even though the ship has been guilty of a deviation. Here, however, the Act has effect only as an agreement of the parties; if the agreement that, unless suit is brought within one year, the ship shall be discharged goes by the board when the ship is guilty of a deviation, the agreement that unless suit is so brought the ship shall be discharged "in any event" will go by the board too. The words "in any event" have no greater sanctity than the rest of the clause.

Id. at 683-684. (emphasis added)

Wessel, Duval's conclusion that a deviation bars

one's assertion of the COGSA time limitation provision in a charter party clearly rests on the fact that the limitation provision was applicable only as a provision of the contract; if its application had been mendated by statute, as is the case here, the court noted that the words " in any event" would preserve the statutory limit even if a carrier were guilty of a deviation. *Id.*

Still another case out of the New York district court the same year as *Wessel, Duval* supports the conclusion that a deviation will not bar defensive use of the COGSA one year limitation period. *Jones v. The Flying Clipper,* 116 F.Supp. 386 (S.D. N.Y. 1953). It focuses our attention on the conceptual differences between defensive use of the $500 per package limitation and the time limitation period when a deviation has occurred. *The Flying Clipper* addressed the issue whether a deviation by the carrier would operate to nullify the COGSA $500 per package limitation defense of section 1304(5). *Id.* In its analysis the court distinguished two earlier decisions[4] which held that a deviation would not bar application of COGSA's one year limitation period. *Id.* at 389. The court did not find these decisions persuasive because "a time limitations clause raises other issues." *The Flying Clipper* also pointed out that:

> ...Judge Augustus N. Hand, weiting for the [Second Circuit] Court of Appeals, in reference to the one year provision contained in the English Carriage of Goods by Sea Act, 1924, which like the United States Act, 1936, was based upon the Brussels Convention-Hague Rules, stated: "Nothing resembling a deviation has been shown

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[4] *See Singer Hosiery Mills v. Cunard White Star,* 1951 A.M.C. 988 (New York Municipal Court 1951); *Potter v. North German Lloyd,* 1943 A.M.C. 738 (N.D. Cal. 1943).

> to deprive the carrier of the benefit of the limitation."

Id. (citing Switzerland General Ins. Co. v. Navigazione Libera Triestina, S.A., 91 F.2d 960, 963 (2 Cir.1944)).

In fact, the analysis of *The Flying Clipper* supports the conclusion that the time limitation defense is not trumped when a deviation occurs. In concluding that an unreasonable deviation would preclude a carrier's reliance on the COGSA per package limitation, *The Flying Clipper* correctly noted[5] that because a deviation by the carrier alters the fundamental risk allocation contemplated by the parties to the contract of carriage and the shipper in insuring the cargo, it necessarily nullifies the risk allocation reflected in a monetary limitation provision. *Id.* at 390. Thus, *The Flying Clipper* concluded that because COGSA's per package limitation of liability provision implicates the allocation of risk between the parties, a deviation by the carrier must deprive it of the protection afforded. *Id. the Flying Clipper* exposes the subtle conceptual differnece between defensive use of the per package limitation and

---

[5] The court stated:

> A shipper has the right to assume that the carrier will not deviate and thereby subject the cargo to other than the known risks inherent in a normal route or underdeck stowage. The shipper protects himself by insurance commensurate with such calculated risks. but when the carrier deviates and enters upon "a different venture from the contemplated," he exposes the cargo to unanticipated and additional risks against which [the shipper] has not protected himself.... To uphold the carrier's contention that the limitation of liabilitty is absolute, regardless of a fundamental breach which goes to the very essence of its undertaking, would permit any carrier with recklessness to violate the terms of the bill of lading, knowing it cannot be called upon to pay more than $500 per package.

Id. at 390.

defensive use of the time limitation in the face of a shipment deviation;; a difference which derives the result here. Since a relationship exists between a deviation which increases cargo risk and defensive use of the monetary limitation to a claim for damage to the cargo, it is theoretically appropriate not to let the one who deviates to use the harsh monetary limits defense. but no such relationship exists between deviaqtion and time limits within which to sue.

The COGSA time limitation period does not significantly bear on the allocation of cargo risk contemplated by the parties in negotiating the contract of carriage or by the shpper in procuring insurance. To the contrary, a time for suit limitation reflects only an estimation of a reasonable period in which to file suit. *Styling Plastics Co. v. Neptune Orient Lines, Ltd.*, 666 F.Supp. 1406, 1413 (N.D.Cal. 1987) (deviation would not void COGSA time bar). It has no conceptual nexus with cargo risk allocation. COGSA's time for suit limitation, them, merely reflects Congress' estimation of a reasonable time in which a shipper or consignee must pursue one's remedies. *See* 79 Cong. Rec. 13341 (1935) ("The present law imposes a very limited restriction on the right to bring suits against the carrier for defaults of one sort or another. This enlarges the time within which a shipper who has suffered damage may bring suit against the carrier."). And so, this Court concludes that the cases Bunge invokes are conceptually incorrect.

Although the Fifth Circuit has not addressed this issue, it has held that a deviation voided the COGSA per package limitation, and has employed reasoning which supports the result this Court reaches. *Spartus Corp. v. The S/S Yafo,* 590 F.2d 1310, 1315-17 (5 cir. 1979). *Yafo* supports the conclusion that the COGSA time bar differs from the per package defense; the time limitation does not concern the allocation of risk between the carrier and the ship-

per, and, therefore, a deviation by the carrier ought not deprive the carrier of its benefit.

Moreover, *Yafo* noted that the language employed in section 1304(5)[6] could support the conclusion that the monetary liability limitation in COGSA mandated its application to all suits on contracts of carriage regardless of deviation, but the court observed that such an interpretation was foreclosed by contrary precedent. *Id.* at 1317. That contrary precedent seemingly disregarded the statute's text because it was at odds waith notions of risk allocation. The time for suit limitation contains similar language: "*In any event* the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered." 46 U.S.C. App. §1303(6) (1970). Without the presence of a risk allocation problem, earlier cases which stray from the statutory text do not instruct or compel this Court not to remain faithful to the text. Thus, because the Court considers the time bar a Congressional mandate and because a time for suit limitation in this context does not relate to the extent to which cargo is put at risk, the Court holds that a carrier's deviation does not block the carrier's defensive assertion of the time limitation period of section 1303(6).

[2,3] Suits against the noncarrier defendants are not governed by COGSA and, thus, are not covered by its time limits. 46 U.S.C. Ap. 1300 et seq. (1970). Therefore, the time bar has no effect on Bunge's suit against the noncarrier Canadian Pacific companies or against Dampsk. Torm.

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[6] Section 1304(5) of the Act reads, "Neither the carrier nor the ship shall *in any event* be or become liable for *any* loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package." 46 U.S.c. App. §1304(5) (1970) (emphasis added).

Dampsk. Torm. is not a carrier becauses the bill of lading was neither issued by it or on its behalf. *Pacific Employers Inc. v. M/V GLORIA,* 767 F.2d 229 (5 Cir. 1985); *Asoc. Metals & Minerals Corp. v S/S PROTORIA,* 1973 A.M.C. 2095 (5 cir. 1973); *Sunil inds v. THE ODGEN FRASER,* 1981 A.M.C. 2670 (S.D.N.Y. 1981); *Demsey & Associates, Inc. v. Steamship Sea Star,* 321 F.Supp. 663 (S.D.N.Y. 1970), *reversed in part on other grounds* 461 F.2d 1009. The same is not true, however, with regard to an *in rem* action against the vessel under COGSA; *Pioneer Import Corporation v. The Lafcomo,* 138 F.2d 907 (2 Cir. 1943); Tetley, *Mariner Cargo Claims* at 83 (2d Cir. 1978). COGSA applies to the lien action against the ship for safe carriage. *Id.*

Consequently, unless the time limitation provision was waived or otherwise tolled, as Bunge contends, Bunge's suit against the carrier and the ship *in rem* is time barred.

B. Waiver of the COGSA
Limitation Provision

[4] Bunge next argues that defendants waived the COGSA time limit by granting Bunge an extension of time within which to sue. Defendants insist they granted no extension to Bunge because any agreement was subject to a condition that Bunge failed to fulfil. The Court finds twhat, although the defendants granted Bunge an extension of time and waived the COGSA one year limitation period, the waiver was, as they contend, subject to a condition that was not fulfilled and therefore without effect.

[5] Although a carrier may waive the right to invoke the COGSA time limitation period, the terms of the waiver must be strictly construed. *United Fruit Company v. J. A. Folger,* 270 F.2d 666, 669 (5 cir. 1959); *General Electric Co. v. M/V Gediz,* 720 F.Supp. 29, 30 (S.D.N.Y. 1989). The Court must therefore examine the terms of the agreement itself. There is no dispute that the Canadian Pacific in-

terests, presumably CPB and some other Canadian Pacific company, made this response to Bunge's request for an extension: "We hereby grant a tgime extension up to and including January 1, 1990 without prejudice on behalf of charterers subject to owners granting similar." The words "subject to owners granting similar;" make the carriers' agreementw to extend conditional - a condition which suspends the agreement's operative effect until the condition is fulfilled. *See* La.Civ.Code Art. 1767[7] (West 1990).

An agreement which is subject to a suspensive condition is not binding until the condition is fulfilled. *See* La.Civ.Code Art. 1767 (West 1990). And if an agreement which is subject to a suspensive condition does not provide a period of time in which the condition must be fulfilled, the condition may be fulfilled within a reasonable time. *See* La.Civ.Code Art. 1773. In this case, the charterers granted the extension on the condition that the vessel's owner would grant a similar extension. This, unless Bunge got such an agreement from the vessel within a reasonable time, the agreement to extend cannot be enforced.

Bunge did not seek or obtain a similar agreement from the vessel owner until over two months after the conditional grant by the Canadian Pacific interests and six weeks after the time for suit had passed. Moreover, it was only after receiving notice from the Canadian Pacific interests (that they considered the condition unfulfilled and the claim time-barred) that Bunge tried to obtain such an agreement. Thus, the Court finds that Bunge failed to fulfill the condition of the extension grant within a reasonable time, and that Bunge's suit against CPB, and any other Canadian Pacific defendant determined to be a carrier, is time-barred.

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[7] Because Admiralty or General Maritime Law provides no guidance in the area of general contract law, the court will look to state law. *St. Hilaire Moye v. Henderson*, 496 F.2d 973, 980 (8 Cir.1974) ("admiralty courts may apply state law by expressed or implied reference when the federal law of admiralty is incomplete").

[6] The same reasons apply to Dampsk. Torm. Dampsk. Torm's grant of extension was subject to the condition that Bunge obtain a similar grant from the charters. The suspensive condition of Dampsk. Torm's agreement was never fulfilled. Before Dampsk. Torm ever indicated its agreement, the Canadian Pacific grant was dissolved or withdrawn. Bunge was unable, subsequent to obtaining the grant from Dampsk. Torm., to obtain a new extension from the Canadian Pacific charterers. Thus, Dampsk. Torm's grant of extension is not binding. Because the Court concludes that the grant is unenforceable due to its unfulfilled suspensive condition, the Court need not address whether it was also invalid because it was obtained after the period for suit had expired.

C. Fraudulent Concealment

[7] In a final effort to avoid application of COGSA's time bar, Bunge asserts that Canadian Pacific fraudulently concealed the identity of the carrier. Bunge contends that its delay in filing suit was caused by fraudulent concealment, and that, as a result, the Canadian Pacific defendants are estopped from invoking COGSA's limitation period to bar Bunge's suit. Bunge is incorrect.

[8-12] While it is true that fraudulent concealment by a defendant will toll the statute of limitations if the plaintiff acts with reasonable diligence to discover the fraudulent conduct, *Pan Am Petroleum Co. v. Orr*, 319 F.2d 612, 614 (5 Cir.1963), Bunge does not attribute to the Canadian Pacific defendants acts sufficient to constitute fraudulent concealment. A plaintiff claiming that fraudulent concealment tolls a limitation period must establish that its failure to timely act "was the result of affirmative conduct by the defendant." *Conmar Corp. v. Mutsui & Co.*, 858 F.2d 499 (9 Cir. 1988), *cert. denied*, 488 U.S. 1010, 109 S.Ct. 795, 102 L.Ed.2d 786 (1989). Passive concealment of information does not constitute fraudulent concealment unless the defendant owes a fiduciary duty to

disclose information to the plaintiff. *Id.* Neither silence or mere inaction constitutes fraudulent concealment. *Gomez v. Great Lakes Steel Corp.*, 803 F.2d 250 (6 Cir. 1986). Moreover, not every act of active concealment will toll a limitation period; the concealment must concern a crucial element or defense. *Hohri v. United States*, 782 F.2d 227 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64, 107 S.Ct. 2246, 96 L.Ed.2d 51.

Bunge only attributes to the Canadian Pacific defendants passive concealment of, or mere inaction regarding the true identity of the Canadian Pacific carrier. That does not toll COGSA's one year time period. *Conmar*, 858 F.2d at 505. Further, lack of knowledge of the identity of the particular Canadian Pacific company did not prevent Bunge from being aware of its claim against the Canadian Pacific interests or deep it from filing suit against at least the known Canadian Pacific participants to protect its rights. *Hohri*, 782 F.2d at 249. (It seems as though Bunge could certainly have filed suit against some of the Canadian Pacific defendants timely, and then amended later to include other parties).

The Court must conclude on this record that fraudulent concealment did not toll the COGSA limitations period. Section 1303(6) time bars Bunge's action against the vessels *in rem* and against the Canadian Pacific carrier. Canadian Pacific admits that CPB entered into the contract of carriage with Bunge, and Bunge does not refute this fact. Thus, the court grants defendants' motion with regard to the vessels, the TORM RASK and the FORT STEELE, and the undisputed carrier, CPB. However, the Court denies the motion insofar as it applies to Dampsk. Torm. and the remaining Canadian Pacific defendants.

II. MOTION TO COMPEL ARBITRATION

[13] the Court questions the merit of Canadian

Pacific's contention that any of the disputes involved in the litigation, other than disputes between it and Dampsk. Torm. "arise out of" the charter party between it and Dampsk. Torm.[8] *Valero Refining, Inc. v. M/T Lauberhorn*, 813 F.2d 60, 64 (5 Cir. 1987) (;;ordinary contract principles determine whi is bound by a written arbitration agreement"). However, the Court need not consider this point because Canadian Pacific has waived its right to arbitration over any dispute involved in this litigation; it actively participated in this litigation and failed to move to compel arbitration until shortly before the scheduled trial.

this litigation was started on December 29, 1989. Since then, the Canadian Pacific defendants have cross-claimed against Dampsk. Torm and actively participated in discovery. On December 14, 1990, nearly a full year later, the Canadian Pacific defendants moved to compel arbitration. The motion was set for consideration on January 9, 1991, less than a month before the scheduled trial date.

[14,15] Even though a strong federal policy favors arbitration, the right to compel arbitration may be waived. *Frye v. Paine, Webber, Jackson & Curtis, Inc.*, 877 F.2d 396 (5 Cir. 1989). A court will find such a waiver when the partay seeking to invoke arbitration actively participates in litigation, or delays in moving to compel arbitration to the prejudice of the other parties. *Id.* at 399; *Price v. Drexel Burnham Lambert, Inc.*, 791 F.2d 1156, 1158-59 (5 Cir. 1986); *Miller Brewing Co. v. Fort Worth Distributing Co.*, 781 F.2d 494, 497 (5 Cir. 1986).

The Court finds that the active participation of Cana-

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[8] The Court is not convinced the disputes between third parties and one of the parties to a charter party containing an arbitration clause can be said to "arise out of" the charter party. *Valero*, 813 F.2d at 64.

dian Pacific in the litigation, its delaying in moving to compel arbitration, and the prejudice that would result to the other parties should arbitration be ordered less than a month before trial of this matter, compel the denial of Canadian Pacific's motion for arbitration.

Accordingly, defendants' motion for summary judgment is GRANTED insofar as it requires dismissal of Bunge's claim against the two vessels *in rem* and the carrier, CPB (Canadian Pacific (Bermuda) Ltd.), as time-barred under COGSA; and DENIED with regard to the remaining Canadian Pacific defendants and Dampsk. Torm *in personam*. Canadian Pacific's motion to compel arbitration is also DENIED.

Supreme Court, U.S.
FILED
MAY 28 1992
OFFICE OF THE CLERK

(2)

NO. 91-1834

In the Supreme Court of the United States

October Term, 1991

BUNGE EDIBLE OIL CORPORATION

Petitioner

VERSUS

CANADIAN PACIFIC (BERMUDA) LTD.
AND A.S. DAMPSKIBSSELSKABET TORM

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether this Court should exercise its discretionary jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit, affirming the District Court's decision that a carrier's material deviation in the carriage of goods by sea does not foreclose the carrier's defensive assertion of the one-year time limitation period provided by §3(6) of the Carriage of Goods by Sea Act, 46 U.S.C. §1301, et seq.

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REPORT OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 949 F.2d 786 (5th Cir. 1992). The opinion of the United States District Court for the Eastern District of Louisiana is reported at 756 F. Supp. 261 (E.D. La. 1991).[1]

STATEMENT OF JURISDICTION

The jurisdiction of this Court arises under 28 U.S.C. §1254.

STATEMENT OF THE CASE

The trial court found, and the United States Court of Appeals for the Fifth Circuit agreed, that if Respondent, Canadian Pacific (Bermuda), Ltd. ("Canadian Pacific (Bermuda)") had committed an unreasonable deviation,[2] this deviation did not foreclose Canadian Pacific (Bermuda)'s defensive assertion of the one-year time limitation period in §3(6) of the Carriage of Goods by Sea

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[1] The District Court's opinion was incorrectly cited in Petitioner's brief as 256 F. Supp. 261 (E.D. La. 1991).

[2] For the purposes of its decision, the District Court proceeded under the assumption that the transshipment of the cargo of RBD palm oil aboard the M/V FORT STEELE at Rotterdam constituted an unreasonable deviation. For the purposes of this brief only and without waiving any defenses as to whether a deviation in fact occurred, Canadian Pacific (Bermuda) will assume that such transshipment constituted an unreasonable deviation.

Act, 46 U.S.C. 1301, et seq. ("COGSA"), and therefore, the claims of Petitioner, Bunge Edible Oil Corporation ("Bunge") against the M/V TORM RASK, the M/V FORT STEELE and Canadian Pacific (Bermuda) as COGSA carriers are time barred.

This case arises out of the claim of Petitioner, Bunge, for alleged damage to a cargo of refined, bleached and deodorized ("RBD") palm oil. This cargo was originally delivered to the TORM RASK on or about July 11, 1988, at Pasir Gudang, Malaysia, for carriage to the Port of New Orleans, Louisiana, pursuant to Bill of Lading PG/NYNOLA-5. The TORM RASK was owned by A/S Dampskibsselskabet Torm ("Torm") and was under time charter to Respondent, Canadian Pacific (Bermuda). Bill of Lading PG/NYNOLA-5 was issued by Canadian Pacific (Bermuda).[3] Thereafter, said cargo was transshipped at the Port of Rotterdam, Netherlands, aboard the FORT STEELE, owned by Canadian Pacific (Bermuda), for carriage to New Orleans, Louisiana. The cargo ultimately was discharged to Barge MMI-307 at Reserve, Louisiana, and delivered to Bunge on or about the week of October 1, 1988.

On December 29, 1989, more than one year following the discharge of the cargo at New Orleans, Bunge filed a complaint

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[3] Uncontradicted testimony, which was found by the District Court and the Fifth Circuit to be accurate, indicated that although the bill of lading was a form tanker bill of lading previously created by Canadian Pacific Steamships London (an entity which ceased active trading in 1983), it was issued in this case by Canadian Pacific (Bermuda).

in the United States District Court for the Eastern District of Louisiana alleging that Canadian Pacific Steamships London, Canadian Pacific Bulkships Service, Ltd., Canadian Pacific Ships ("Canadian Pacific entities"), and/or Torm in personam[4] were liable in their capacity as carrier for the damage allegedly sustained to the cargo of RBD palm oil at some point during transit. The Canadian Pacific entities answered the complaint alleging that the claims asserted by Bunge were time barred under §3(6) of COGSA. Thereafter, on June 14, 1990, Bunge amended its complaint to add Canadian Pacific (Bermuda) as a party defendant, alleging that it too was liable to Bunge in its capacity as carrier. Similarly, Canadian Pacific (Bermuda) answered Bunge's complaint alleging that its claims were time barred under §3(6) of COGSA.

On December 14, 1990, the Canadian Pacific entities and Canadian Pacific (Bermuda) filed a motion for summary judgment seeking dismissal of Bunge's claims on the basis that its claims for cargo damage were time barred pursuant to §3(6) of COGSA. Without oral argument, the District Court issued an order on January 15, 1991, granting the motion for summary judgment on the time-bar issue in favor of the TORM RASK and the FORT STEELE, in rem and Canadian Pacific (Bermuda), in personam, as the COGSA carriers. Specifically, the District Court held that although there may have been a material deviation in the shipment of Bunge's cargo, that deviation would

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[4] Although Bunge also sued the TORM RASK and the FORT STEELE, in rem, service was never made and the in rem claims were never pursued.

not foreclose the carriers' defensive assertion of the one-year time limitation period provided by §3(6) of COGSA. This decision was affirmed by the United States Court of Appeals for the Fifth Circuit January 2, 1992.

SUMMARY OF ARGUMENT

The District Court, as affirmed by the Fifth Circuit, was correct in granting summary judgment in favor of the M/V TORM RASK, the M/V FORT STEELE and Canadian Pacific (Bermuda) Ltd. based on §3(6) of the Carriage of Goods by Sea Act, 46 U.S.C. §1303(6), dismissing the claims asserted against them by Bunge Edible Oil Corporation under Bill of Lading PG/NYNOLA-5 as time barred.

The District Court, as affirmed by the Fifth Circuit, also was correct in holding that any deviation committed by the TORM RASK, the FORT STEELE and Canadian Pacific (Bermuda) as COGSA carriers did not foreclose their defensive assertion of the one-year time limitation provision of §3(6) of COGSA. Although this holding, one of first impression in the Fifth Circuit, is in conflict with a line of cases which originated in the Southern District of New York, both the District Court and the Fifth Circuit concluded that that particular line of cases was based on a misapplication and an erroneous extension of precedent which should not be perpetuated in the Fifth Circuit.

ARGUMENT

A DEVIATION DOES NOT DEPRIVE AN OCEAN CARRIER OF THE PROTECTION OF THE COGSA ONE-YEAR STATUTE OF LIMITATIONS.

Because Bunge's claims arise from the carriage of a cargo of RBD palm oil from a foreign port (Pasir Gudang) to a port of the United States (New Orleans), the terms and conditions of the Carriage of Goods By Sea Act apply to the resolution of those claims as a matter of law. 46 U.S.C. §1312.

This issue was one of first impression in the Fifth Circuit. Prior to rendering their decisions, the District Court and the Fifth Circuit each made an insightful review of the existing case law of other circuits and correctly held that a carrier's material deviation in the carriage of goods by sea does not preclude the carrier's defensive assertion of the one-year time limitation period in §3(6) of COGSA. Birdsall, Inc. v. Tramore Trading Co., Inc., 771 F. Supp. 1193 (S.D. Fla. 1991); P.T. Asuransi Parolamas v. M/V ROBERT E. LEE, 1989 AMC 2885 (D.N.J. 1989); Rohm & Haas v. American President Lines, Ltd., 1989 AMC 420 (S.D.N.Y. 1988); Insurance Company of North America v. S/S OCEANIS, 690 F. Supp. 1365 (S.D.N.Y. 1988); Styling Plastics Co., Ltd. v. Neptune Orient Lines, Ltd., 666 F. Supp. 1406 (N.D. Ca. 1987); Corat International, Inc. v. Saudi National Lines, 439 So.2d 1035 (Fla. App. 3 Dist. 1983); Singer Hosiery Mills v. Cunard White Star, 1951 AMC 988 (Mun. Ct. N.Y. 1951); Potter v. North German Lloyd, 1943 AMC 738 (N.D. Ca. 1943). Therefore, Bunge's claims against

the TORM RASK, the FORT STEELE and Canadian Pacific (Bermuda) are time barred.

In ROBERT E. LEE, the court clearly explains the rationale behind its holding:

> [Plaintiff] does not contend that it did not know of, or could not discover, the water damage to the [cargo] on the date of delivery - the triggering event of the COGSA limitations period. Thus, the deviation, if one occurred, did not have any affect on its ability to commence this action within the one-year period....

ROBERT E. LEE, 1989 AMC at 2892.

Similarly, the act of transshipment of Bunge's cargo of RBD palm oil at Rotterdam cannot be said to have affected Bunge's ability to commence suit within the requisite one-year period, given its knowledge of the potential claim and its correspondence with certain Canadian Pacific entities as early as five days following discharge of the cargo.

Section 3(6) of COGSA specifically provides:

> In any event, the carrier and the ship shall be discharged from all liability in respect of loss or damage, unless suit is brought within one year

> after delivery of the goods or the date when the goods should have been delivered.

46 U.S.C. §1303(6).

Commenting on the language of the statute, the court in Singer Hosiery explained its holding as follows:

> This provision of the Act is all inclusive; it is of the substance of the rights between the parties. Granting that a breach has occurred and even assuming that the provisions of the bill of lading have been nullified and the carrier has become an insurer, under our Federal law which governs this action, the shipper unless he has in some manner been relieved from the one-year limitation, is bound to begin the action for a breach within one year after delivery of the goods or when the goods should have been delivered.

Singer Hosiery, 1951 AMC at 990.

BUNGE'S RELIANCE UPON PRE-COGSA LAW OF DEVIATION IS MISPLACED.

Bunge relies heavily upon the pre-COGSA law of deviation; however, its application to the present case is misplaced. Prior to the enactment of COGSA in 1936, the law of carriage of

goods by sea, including the effect of a material deviation, was governed by the terms and conditions of the contract of carriage and interpreted under contract law. Thus, a carrier's material deviation in the carriage of goods by sea was considered a breach of the contract of carriage, thereby vitiating the entire contract including the defenses and limitations. The Delaware, 81 U.S. (14 Wall.) 579 (1872). This breach of contract interpretation of the effect of a carrier's material deviation has not changed following the enactment of COGSA, it continues to apply when COGSA does not apply by operation of law but when COGSA is incorporated into the contract of carriage by the parties.[5] United States v. Wessel Duval & Co., Inc., 115 F. Supp. 678 (S.D.N.Y. 1953).

In Wessel Duval, a time charterer, the United States, bareboat chartered the vessel to Wessel Duval and the parties incorporated the terms and conditions of COGSA into the bareboat charter. Thereafter, the United States brought suit against Wessel Duval for the loss of its cargo and Wessel Duval attempted to dismiss the claims as time barred under §3(6) of COGSA. The United States responded alleging that "the conduct of ... [Wessel Duval] ... was such as to deprive it of the benefits of the one-year limitation in [COGSA]." Id. at 683. The Court resolved this issue in favor of the United States based on Wessel

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[5] Section 1312 of COGSA specifically permits parties entering into a contract of carriage, which otherwise would not be subject to its terms and conditions, to draft the contract of carriage expressly stating that it shall be subject to the terms and conditions of the statute. 46 U.S.C. §1312.

Duval's breach of contract and not based on an analysis of the language of §3(6) of COGSA.

In contrast, when the terms and conditions of COGSA apply to the carriage of goods by sea as a matter of law rather than as a negotiated provision within a contract of carriage, it is the language of the statue that governs the relationship between the carrier and the shipper and not the law of contracts. The court in Wessel Duval recognized the important difference between the application of COGSA through a contractual agreement and the application of COGSA by statue in stating that:

> [t]hose words 'in any event' may well result in preserving this statutory limitation even though the ship has been guilty of a deviation. Here, however, the Act has effect only as an agreement of the parties; if the agreement that unless suit is brought within one year, the ship shall be discharged goes by the board when the ship is guilty of a deviation, the agreement that unless suit is so brought the ship shall be discharged 'in any event' will go by the board too.

Id. at 684.

Thus, the post-COGSA contract law of deviation has not changed, it merely recognizes that with the enactment of a statute, when that statute applies by operation of law, rather than through its incorporation by the parties into a contract of

carriage, the plain language of the statute applies to the resolution of a dispute.

The plain language of COGSA under scrutiny here clearly provides that

> [i]n any event the carrier and the ship shall be discharged from all liability and respective loss or damage unless suit is brought within one year after discharge of the goods....

46 U.S.C. §1303(6). (Emphasis added.)

The words "in any event" in the time limitation provision preserve the statutory limitation even though the ship has been guilty of a deviation. The District Court and the Fifth Circuit were correct in applying the plain language of the statute dismissing Bunge's claims as time barred.

As the District Court and the Fifth Circuit correctly recognized, the holding in Wessel Duval has been erroneously extended by other courts (and Bunge) as precedent in cases such as this in which COGSA applies to the carriage of goods by

operation of law.[6] Thus, it is the improper extension and misapplication of the holdings of Wessel Duval, Minex, Cerro and S/S EXMINSTER by the courts in Allstate Insurance Company v. International Shipping Corp., 1982 AMC 1763 (S.D. Fla. 1981); Italia Di Navigazione v. M/V HERMES I, 1984 AMC 485 (S.D.N.Y. 1983), aff'd, 724 F.2d 21 (2nd Cir. 1983); Northwestern National Insurance Co. v. Miles A. Galin, 1987 U.S. Dist. Lexis 10927, N. 85 Cir. 1832 (S.D.N.Y. 1987) which the Fifth Circuit insightfully refused to perpetuate. The courts in International Shipping, M/V HERMES I and Miles A. Galin each relied upon cases decided under a breach of contract analysis, erroneously extending that precedent to their own facts in which COGSA applied as a matter of law.

This Court should not grant a writ of certiorari in this case. The District Court and the Fifth Circuit were correct in refusing

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[6] Beyond its misplaced reliance on Wessel Duval, Bunge further relies on three subsequent cases following the rationale of Wessel Duval. Insurance Company of North America v. The S/S EXMINSTER, 127 F. Supp. 541 (S.D.N.Y. 1954); Minex v. International Trading Company of Virginia, 303 F. Supp. 205 (E.D. Va. 1969); Cerro Sales Corporation v. Atlantic Marine Enterprises, Inc., 403 F. Supp. 562 (S.D.N.Y. 1975). These cases also hold that a carrier's deviation forecloses its ability to defensively assert COGSA's one-year time limitation provision when the terms and conditions of COGSA are not mandated by statute but apply by way of incorporation into the bill of lading, charterparty or contract of carriage. Accordingly, Bunge's reliance on these breach of contract cases is equally misplaced.

to follow those courts which relied upon prior jurisprudence decided under a breach of contract theory as precedent for situations in which COGSA applies as a matter of law. The District Court and the Fifth Circuit also were correct in following those courts which apply the plain language of the statute, preserving a deviating carrier's defensive assertion of the one-year time limitation in §3(6) of COGSA.

A portion of Bunge's lengthy historical analysis of pre-COGSA law, which is inapplicable to the present issue, includes an inaccurate discussion of British law. In fact, the leading British case involving the [British] Carriage of Goods by Sea Act 1971 (Commencement) Order 1977 (S.I. 1977, No. 981) and the effect of a deviation upon the one-year time limitation[7] is not Stagline Ltd. v. Foscolo, Mango & Co., (The IXIA), [1932] A.C. 328 (1931) as Bunge suggests. In 1986, the court in Kenya Railways v. Antares Co. Pte. Ltd. (The "Antares"), (Nos. 1 and 2) Q.B. (Com. Ct.) [1986] 2 Lloyd's Rep. 626; [1986] 2 Lloyd's Rep. 633; C.A. [1987] 1 Lloyd's Rep. 424,

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[7] The one-year time limitation in the [British] Carriage of Goods by Sea Act is found in art. III, r. 6 of the Hague Visby Rules and provides:

> ... the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen.

held that the carrier's "fundamental breach" in stowing goods on deck did not preclude the carrier from relying on the one-year time limitation of art. III, r. 6 of the Hague Visby Rules (Carriage of Goods by Sea Act). In affirming the lower court, Lord Justice Lloyd explained:

> [Appellee] relies on a passage in the current edition of Scrutton [on Charterparties] at p. 167:
>
> > The effect of deck stowage not so authorized will be to set aside the exceptions of the charter or bill of lading, and to render the shipowner liable under his contract of carriage for damage happening to such goods.
>
> That passage has appeared in identical terms in successive editions of Scrutton, going back, we are told, to the last edition for which Lord Justice Scrutton was himself responsible. But with great respect to the editors of the current edition it no longer represents the law. The doctrine of fundamental breach upon which [the appellee] relies, that is to say the doctrine that a breach of contract may be so fundamental as to displace the exceptions clauses altogether, no longer exists. The death knell sounded in Swisse Atlantique Societe d'Armement Maritime

> S.A. v. Rotterdamsche Kolen Centrale, [1966] 1 Lloyd's Rep. 529; [1967] 1 A.C. 361.

The ANTARES, C.A. [1987] 1 Lloyd's Rep. at 429.

The analysis of the lower court in The ANTARES was similar to that of the Fifth Circuit in this case, they began by noting that

> [t]he starting point must be that the Hague Visby Rules are compulsorily applicable....

and concluded with an examination of the language of the statute. The ANTARES, Q.B. (Com. Ct.) [1986] 2 Lloyd's Rep. at 636. Finally, the court of appeals stated:

> The sole question therefore is whether, on its true construction, art. III, r. 6 applies. It is clear that it does. It provides that the carrier shall in any event be discharged from all liability whatsoever unless suit is brought within one year.

The ANTARES, C.A. [1987] 1 Lloyd's Rep. at 430.

Thus, British law does not support Bunge's view, it provides that when the [British] Carriage of Goods by Sea Act applies as a matter of law, a carrier's deviation does not preclude the carrier's defensive assertion of the one-year time limitation period.

BUNGE'S RELIANCE UPON AN ANALOGY TO THE $500 PER PACKAGE LIMITATION IS MISPLACED.

Bunge argues that further support for its position can be found by analogy to jurisprudence holding that a carrier's unjustifiable deviation deprives it of the benefit of the $500 per package limitation of liability contained in §3(4) of COGSA. In making this inappropriate analogy, Bunge cites Jones v. The Flying Clipper, 116 F. Supp. 386 (S.D.N.Y. 1953); Spartus Corporation v. S/S YAFO, 590 F.2d 1310 (5th Cir. 1979); Searoad Shipping Company v. E.I. duPont de Nemours & Company, 361 F.2d 833 (5th Cir. 1966); General Electric Company International v. S.S. NANCY LYKES, 706 F.2d 80 (2nd Cir. 1983). However, these cases clearly explain their rationale for depriving the carrier of the benefit of the $500 per package limitation of liability provision in COGSA following an unreasonable deviation:

> ... when the carrier deviates and enters upon a different venture from that contemplated, he exposes the cargo to unanticipated and additional risks against which he can not protect himself.

The Flying Clipper, 116 F. Supp. at 389, quoting, The Chester Valley, 110 F.2d 592, 594 (5th Cir. 1940).

The Second Circuit has further explained this rule in stating that:

> [U]nreasonable deviations are 'fundamental breach[es] which go [ ] to the very essence of the undertaking' ... since they expose cargo to unanticipated and additional risks.... It follows that a deviation which unjustifiably exposes cargo to unanticipated risks is such a serious breach of the contract of carriage that the carrier must be deprived of the protection of the §4(5) liability limitation.

S.S. NANCY LYKES, 705 F.2d at p. 87, quoting, The Flying Clipper, 116 F. Supp. at p. 389.

To deprive the carrier of the defensive use of the one-year time limitation through an analogy to these cases depriving the carrier of the $500 per package limitation would be an incorrect interpretation and application of this precedent. The underlying analysis of the voiding of the $500 per package limitation in §4(5) of COGSA following an unreasonable deviation turns on the fact that voiding this section renders the carrier liable, in essence as an insurer, forcing him to compensate the cargo owner for his breach. It would be impossible to apply this same analysis with regard to the one-year time limitation provision

> since a statute of limitation provision does not address liability or equitable results, but rather protects all parties, and the societal interest in

> prompt resolution of disputes, from unwarranted delay in bringing suits.

Insurance Company of North America v. S/S OCEANIS, 690 F. Supp. at 1367.

In fact, in creating the rule voiding COGSA's $500 per package limitation following an unreasonable deviation, the court in The Flying Clipper itself recognized that the two situations were distinct such that making an analogy based on one for resolution of the other would be inappropriate. In refusing to rely on cases cited by the carrier declining to void the time limitation following a carrier's deviation, the court stated:

> I do not consider these [cases] determinative of the issue presented under §1304(5) of the Act or controlling precedent, particularly so, since as counsel pointed out, a time limitation clause raises other issues. Moreover, Judge Augustus N. Hand, writing for the Court of Appeals, in a reference to the one-year provision ... stated: 'Nothing resembling a deviation

> has been shown to deprive the carrier of the benefit of the limitation."[8]

The Flying Clipper, 116 F. Supp. at 390, quoting, Switzerland General Ins. Co. v. Navigazione Libera Triestina, S.A., 91 F.2d 960, 963 (2nd Cir. 1944).

Accordingly, Canadian Pacific (Bermuda) submits that the District Court was correct in refusing to follow the line of cases which rely on an analogy to those cases denying the carrier the $500 per package limitation of COGSA following an unreasonable deviation as precedent to deny the carrier the defensive use of the time limitation period following a deviation. The courts that specifically have rejected the use of those cases voiding the COGSA $500 per package limitation provision following an unreasonable deviation as precedent for depriving the carrier of the defensive use of COGSA's one-year time limitation provision following an unreasonable deviation are correct. ROBERT E. LEE, supra; Rohm & Haas, supra; S/S OCEANIS, supra; Styling Plastics, supra.

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[8] In an effort to taint its persuasive effect, Bunge boldly concludes that "the district court below as well as other courts" have misinterpreted the statement made by Judge Augustus N. Hand. However, Bunge cites no authority in support of its "interpretation" of the meaning behind Judge Hand's remarks and accordingly, Bunge's lone construction of its meaning must fail.

CONCLUSION

Bunge Edible Oils' Petition for Writ of Certiorari should be denied. The holding of the District Court, as affirmed by the Fifth Circuit, dismissing the claims of Bunge as time barred as per §3(6) of COGSA was correct.

Respectfully submitted,

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